Supreme Court, U.S.
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CASE NO. _____

In The
Supreme Court of the United States

RACHAEL PEREZ,

Petitioner,

v.

MIAMI-DADE COUNTY,

Respondent.

On Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTION PRESENTED

The anti-retaliation clause contained in Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any of his employees" because they have opposed discrimination or harassment. 42 U.S.C. § 2000e-3(a). The EEOC has interpreted the phrase "to discriminate" to "prohibit *any* discrimination that is reasonably likely to deter protected activity", *EEOC Compliance Manual*, § 8 at 8-14 & 15 (May 1998) (emphasis in original), while the courts have generally construed the phrase to protect an employee from any "adverse employment action." The district court in this case held that an employer is only prohibited from taking "ultimate employment actions" (such as discharge) against an employee, and the Eleventh Circuit affirmed. The circuits are split on what the standard is for proving retaliation; namely, whether the plaintiff must prove she suffered an "ultimate employment action."

The question presented is whether the EEOC's Guidelines and interpretation of Title VII should be upheld, or whether employers may lawfully retaliate against employees by engaging in means other than ultimate employment decisions (such as discharges and demotions).

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OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals affirming the Southern District Court of Florida's Order Granting Defendant's Motion for Summary Judgment is unpublished. It is included in the appendix at App. 1a. The district court's Order Granting Defendant's Motion for Summary Judgment is unpublished. It is included in the appendix at App. 10a. The Eleventh Circuit's denial of rehearing is also unpublished. It is included in the appendix at 27a.

STATEMENT OF JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals was rendered on October 2, 2001. App. 1a. Rehearing was denied on November 21, 2001. App. 21a. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Title VII's Anti-Retaliation Clause

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice . . . [which is discriminatory, or which he reasonably believes to be discriminatory] or because he has made a charge, testified, or participated in any manner in an investigation, proceeding or hearing under this

subchapter.

42 U.S.C. § 2000e-3(a) (2000).

Title VII's Anti-Discrimination Clause

> [It is unlawful for an employer] to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . .

42 U.S.C. § 2000e-2(a)(1).

EEOC Guideline

> The anti-retaliation provisions are exceptionally broad. They make it unlawful 'to discriminate' against an individual because of his or her protected activity. This is in contrast to general anti-discrimination provisions [§ 2000e-2(a)(1)] which make it unlawful to discriminate with respect to an individual's 'terms, conditions or privileges of employment.' The retaliation provisions set no qualifiers on the terms 'to discriminate,' and therefore prohibit *any* discrimination that is reasonably likely to deter protected activity. They do not restrict the actions that can be challenged to those that affect the terms and conditions of employment.

EEOC Compliance Manual, § 8, at 8-14 & 15 (May 1998) (emphasis in original).

STATEMENT OF THE CASE

In July, 1995, Petitioner, a female uniformed law enforcement officer, lodged an internal complaint with the Miami-Dade County Police Department's ("MDPD") Internal Affairs Division, concerning sexual harassment. Thereafter, Petitioner's supervisory personnel began waging a retaliatory campaign against her because she filed the internal complaint, and therefore Petitioner filed a Charge of Discrimination with the Equal Employment Opportunity Commission and the Florida Commission on Human Relations on June 30, 1997. The retaliation continued unabated, and Petitioner filed this lawsuit against MDPD alleging gender discrimination and retaliation, pursuant to 42 U.S.C. § 2000e *et seq.* ("Title VII") and *Florida Statutes* § 760.01 *et seq.* ("FCRA"), on May 26, 1998. Thereafter, the retaliation still continued. Most of the testimony concerning the retaliation in this case is corroborated by uniformed supervisory police personnel who witnessed it.

The district court granted the Respondent's motion for summary judgment, holding that Perez had not suffered any adverse employment action. The district court, contrary to the EEOC's Guidelines, interpreted Title VII's anti-retaliation clause as requiring "ultimate employment action", and held that since Petitioner was not fired or demoted, she could not recover under Title VII.

Perez's life was a made extremely difficult after she complained of sexual harassment, and the retaliatory conduct toward her continued, and in fact increased, after she filed a Charge of Discrimination, declared that she was going to go to the EEOC for assistance, and then filed this lawsuit. A

reasonable jury could find that Petitioner was subject to numerous adverse retaliatory employment actions, as prohibited by Title VII. By all accounts, Petitioner is a highly decorated officer (although those decorations slowed considerably after she filed a harassment complaint), and respected by her peers.

In September, 1995 (two months after complaining of sexual harassment), Petitioner was transferred from the Northside District to the Intracoastal District. According to officers at the Intracoastal District, after Petitioner was transferred, but before she physically arrived there, the Intracoastal District was abuzz with discussion concerning how an officer who had complained of sexual harassment was being transferred into their unit. Everyone, including Petitioner's superiors, learned that Petitioner had filed such a complaint.

In October, 1995, Capt. Linville tried to force Petitioner back from surgery contrary to her doctor's orders, and made denigrating statements about her behind her back, such as that she was "malingerer" and a "troublemaker" (for filing the complaint regarding sex harassment). According to Lt. McGillivray, when Petitioner did come back from sick leave, Capt. Linville disparaged her behind her back, but did not disparage other officers who were on sick leave (for things that did not require surgery, unlike Petitioner's medical problems which required surgery). Lt. McGillivray testified that Capt. Linville disparaged by stating that she had filed a discrimination complaint at Northside and thus could not "get along" with anybody there.

In February, 1996, Petitioner's lieutenant, Lt. O'Connell, ordered Sgt. Campbell to follow Petitioner around, and when Petitioner questioned this tactic, he told her that if she thought it was harassment, that was "too bad". That same month, Petitioner was evaluated by Sgt. Campbell, but Lt.

O'Connell without explanation improperly lowered Petitioner's scores on the evaluation. When Petitioner questioned the lowered evaluation, Lt. O'Connell went off on a tirade telling her that she had better "play the game", that she was lazy, a terrible officer, that he could suspend or terminate her, and that she better not complain of discrimination again. Petitioner told Lt. O'Connell that she would not sign the evaluation without first talking to Major Gentile, but Lt. O'Connell grabbed the changed evaluation from Petitioner and wrote on it that Petitioner had "refused" to sign it, and he ordered Sgt. Campbell to initial it, as if Sgt. Campbell had given Petitioner the low scores.

Petitioner demanded formal action when a fellow officer battered her, but Lt. O'Connell refused, and issued written discipline to Petitioner instead, although Petitioner did nothing wrong. Additionally, Petitioner's requests to conduct swim training were denied, and Lt. McGillivray testified that he felt that those requests were denied due to retaliation, and that denials to conduct such training are unusual, and contrary to policy.

On another occasion in February, 1996, Lt. O'Connell told Petitioner that she should take her uniform off and quit, and that she was a "troublemaker" and "stupid". Because of Lt. O'Connell's abusiveness, Petitioner sought assistance from Major Gentile, but rather than offering solace, he made disparaging comments about her complaining of discrimination at Northside.

In May, 1996, Major Gentile and Lt. Carrel met with Petitioner concerning her complaints of Lt. O'Connell's abusiveness. Major Gentile refused to discuss the inappropriate discipline Petitioner received from Lt. O'Connell, but told her that he knew she got kicked out of the Northside District

because she "didn't get along with her squad", which meant that Petitioner had filed a sexual harassment complaint. Petitioner than told Major Gentile that she had no choice but to go to the EEOC for assistance. Lt. Carrel tried to convince Petitioner not to go to the EEOC, which the district court interpreted to mean that Lt. Carrel was merely attempting to conciliate Petitioner's concerns in good faith, although a reasonable jury could find that Lt. Carrel was attempting to stymie Petitioner's attempts to remedy the retaliatory atmosphere.

The day after the meeting, Lt. Carrel called Petitioner into his office and told her that he did not "think that [Petitioner] should be a police officer", and that he was going to discipline her for abuse of sick time (although she was not abusing sick time). Lt. Carrel further told Petitioner that he had "checked up on [her]" and that he knew she was "kicked out" of the Northside District. Petitioner "corrected" him and told him that she left Northside because she had to file a sexual harassment complaint, and Lt. Carrel said that he knew that. Lt. Carrel told Petitioner that his own sister had filed a sexual harassment complaint where she worked, and that he was tired of hearing about it.

Officer Williams testified that Petitioner was singled out for radar duty, an undesirable job assignment, on an inordinate number of occasions. According to Lt. McGillivray and Petitioner, Lt. Carrel also denied Petitioner's requests to conduct swim training. In February, 1997, Lt. Carrel attempted to force Petitioner to change a missing weapons report to make it look as if Petitioner allowed a weapon to be stolen from her custody, when it was only known that the weapon was missing, in order to make her look bad and/or as a contrivance for improper discipline. During this time, Petitioner continued to receive improperly lowered evaluation scores, and other officers

admitted that the scores Petitioner was receiving were obviously inappropriately low.

An incident was contrived to attempt to get Perez fired when Perez did nothing wrong, and where Perez was eventually suspended for 20 days, when Officer Dubocq and Petitioner were involved in another incident in December, 1996. An altercation broke out and a suspect committed a battery on Petitioner. Additionally, Officer Dubocq battered Petitioner. Petitioner's sergeant came to the scene, and spoke with Dubocq's witnesses, but refused to speak with the witnesses that saw Dubocq batter Petitioner. Additionally, Petitioner's sergeant (and Capt. Linville who had arrived on the scene) ordered her to un-arrest the suspect who battered her.

Lt. McGillivray attempted to speak to Capt. Linville about the incident, but Capt. Linville told him to "stay out of it." Capt. Linville referred the incident to internal affairs. Lt. McGillivray testified that it is not customary to relate a reported (legitimate) bad arrest to internal affairs, and that in 31 years of police work with Respondent, he has never heard of an officer suspended for making a bad arrest, nor has he ever submitted to internal affairs a bad arrest situation.

Lt. Carrel and Capt. Linville originally recommended that Petitioner be terminated for the "bad" arrest (which was actually a battery on a law enforcement officer). Lt. McGillivray was of the opinion that a termination under such circumstances would have been "extraordinary". Petitioner was suspended with pay for 20 days, but that was later reduced to a 5-day suspension after an administrative appeal. The 5-day suspension that Petitioner received has negatively affect her ability to transfer to a specialized unit (which is a desirable assignment, involving higher pay and possible advancement).

Petitioner was then moved to Sgt. Buchman's squad, who referred to women (including Petitioner) as "split tails", which is a crude reference to female genitalia. Lt. Carrel was the platoon lieutenant and Capt. Heller replaced the now retired Capt. Linville. Petitioner was singled out by Lt. Carrel at roll call, because he would only come to roll call when Petitioner was present, so he could disparage her in front of the squad. Lt. Carrel made Sgt. Buchman change his evaluation of Petitioner by lowering certain scores to "below satisfactory" to make it reflect more negatively on Petitioner. One sergeant testified that Petitioner's lawsuit was driving Lt. Carrel "crazy."

Sgt. Buchman inappropriately interfered with a call that Perez was handling, and inappropriately issued her written discipline over the incident. Additionally, he told her that the whole squad was complaining about the way that she worked, that she had no pride in herself, in her squad, or have any respect for her job, all of which was untrue. Petitioner asked Sgt. Buchman who in the squad would say such things, and he refused to inform Petitioner of any names.

In May, 1998, Petitioner was forced to undergo a fitness for duty examination for no reason other than to disparage her. According to Lt. McGillivray, such an examination reflects negatively on an officer, because it means that the officer's ability to perform their job is being questioned. In early, 1998, Petitioner's request to transfer to the Doral District was denied, and she was told it was because she filed a sexual harassment complaint. Her requests to transfer to Canine, and Property and Evidence, and to receive training were similarly denied, although officers who had not complained of discrimination were allowed to train and transfer. Moreover, Sgt. Soderman, Petitioner's sergeant at the time, approved the requests, only to be reversed by Lt. Diers and Capt. Heller.

In May, 1998, Petitioner was switched to Sgt. Soderman's squad. According to Sgt. Soderman, at the time of the switch, Sgt. Buchman made a point of telling Petitioner's new sergeant that Petitioner had filed a sexual harassment complaint, and was presently suing Miami-Dade County. Sgt. Soderman heard discussion about Petitioner's lawsuit in the sergeant's office on a regular basis. According to Sgt. Soderman, Lt. Diers, the platoon lieutenant, spoke badly of Petitioner directly to Sgt. Soderman as soon as he found out that Petitioner was switched to his platoon, as he stated that Petitioner "was a problem", as she had filed both a charge of discrimination and a lawsuit.

Petitioner continued to complain about the retaliation, but Lt. Diers would not allow Petitioner to bring her grievances about retaliatory treatment to Capt. Heller or Director Alvarez, in violation of the MDPD's own policies.

Petitioner was not assigned a take-home vehicle while she was assigned to Sgt. Soderman's squad; Petitioner would therefore have to submit her mileage for reimbursement. Sgt. Soderman testified how Lt. Diers decided he would check the mileage that Petitioner had submitted (in what amounted to a sham investigation of Petitioner), as follows:

> A: . . . [Lt. Diers] decided to check the mileage of [Perez] and another officer at that time.
>
> Q: Do you know what other officer's mileage he decided to check?
>
> A: Officer Rudy, Brian Rudy.

Q: Do you know why he checked Officer Rudy's mileage?

A: So it wouldn't look as though he was singling out Rachael [Perez].

Q: How do you know that's the case?

A: He told me.

Sgt. Soderman testified that she has never seen a supervisor such as Lt. Diers ever "check mileage in that way before." At the time Lt. Diers conducted this "investigation" into Perez, he was aware that Perez had filed a complaint of discrimination.

Certiorari review is sought because of the: (1) substantial statutory interpretation implications of the decisions below; (2) need to determine the propriety of the EEOC Guideline that the courts below rejected; and (3) split in the circuits and conflict with one of this Court's prior opinions.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS AN IMPORTANT BUT UNANSWERED QUESTION CONCERNING STATUTORY INTERPRETATION OF TITLE VII'S ANTI-RETALIATION CLAUSE, AND WHETHER THE EEOC'S GUIDELINES, WHICH STATE THAT ACTIONABLE RETALIATORY ADVERSE EMPLOYMENT ACTION MAY FALL SHORT OF ULTIMATE EMPLOYMENT ACTION, SHOULD BE OVERRULED.

In order to establish a prima facie case of retaliation under Title VII, a plaintiff must prove the following three

elements: (1) that she engaged in statutorily-protected activity (*i.e.*, she either *opposed* activity that violated Title VII or which she believed in good faith violated Title VII and/or she *participated* in a proceeding, such as by filing a charge of discrimination or lawsuit); (2) she suffered adverse employment action; and (3) the adverse employment action was causally related to her protected activity. *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1196 (11th Cir. 1997). The quantum of proof concerning the second element is at issue here, specifically, what types of retaliatory conduct constitute "adverse employment action."

The anti-retaliation clause under Title VII provides, in pertinent part, as follows:

> It shall be an unlawful employment practice for an employer *to discriminate* against any of his employees . . . because he has opposed any practice . . . [which is discriminatory, or which he reasonably believes to be discriminatory] or because he has made a charge, testified, or participated in any manner in an investigation, proceeding or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added). What constitutes a term or condition of employment for a discrimination or harassment claim is commonly held to be a more serious and material employment change as opposed to what constitutes adverse employment action for retaliation purposes. *EEOC Compliance Manual*, § 8, at 8-14 & 15 (May 1998). Concerning disparate treatment discrimination, Title VII provides that it is unlawful for an employer "to discriminate against any individual with respect to this compensation, terms,

conditions, or privileges of employment . . . ." 42 U.S.C. § 2000e-2(a)(1).

The EEOC has interpreted § 2000e-3(a) differently than § 2000e-2(a)(1), by not requiring the materiality—affecting a term or condition of employment—required by § 2000e-2(a)(1). In fact, the EEOC specifically addresses in its Guidelines why it has interpreted § 2000e-3(a) differently than § 2000e-2(a)(1), as follows:

> The anti-retaliation provisions are exceptionally broad. They make it unlawful 'to discriminate' against an individual because of his or her protected activity. This is in contrast to general anti-discrimination provisions [§ 2000e-2(a)(1)] which make it unlawful to discriminate with respect to an individual's 'terms, conditions or privileges of employment.' The retaliation provisions set no qualifiers on the terms 'to discriminate,' and therefore prohibit *any* discrimination that is reasonably likely to deter protected activity. They do not restrict the actions that can be challenged to those that affect the terms and conditions of employment.

EEOC Compliance Manual, § 8, at 8-14-15 (May 1998) (emphasis in original). The EEOC further clarified its position on this issue in its Compliance Manual, as follows:

> Although trivial annoyances are not actionable, more significant retaliatory treatment that is reasonably likely to deter protected activity is unlawful. There is no

> requirement that the adverse employment action materially affect the terms, conditions, or privileges of employment.

EEOC Compliance Manual, at iv (May 1998).

At the outset, the EEOC's Guidelines "are entitled to great deference." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). The EEOC's interpretation of the statute is reasonable, and should not be overruled. Both the district court and the Eleventh Circuit completely disregarded these Guidelines in their opinions, although they were attached to Petitioner's response to summary judgment and Appellate Brief.

Title VII's anti-retaliation clause simply does not contain a requirement that there be an "ultimate employment action", and such a requirement should not be read into the statute. To do so would require that the statute be construed narrowly, when, as a remedial statute, it is to be construed broadly in favor of remediation. *Pullman-Standard v. Swint*, 456 U.S. 273, 275 (1982) (holding that Title VII is to be interpreted broadly in favor of remediation). Accordingly, the lower courts have erroneously interpreted Title VII, because they have interpreted it to require an "ultimate employment action" when the statute itself contains no such requirement.

II. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH A DECISION OF THIS COURT, DECISIONS OF OTHER CIRCUITS, AND IT CONFLICTS WITH PREVIOUS PANEL DECISIONS OF THE ELEVENTH CIRCUIT.

The circuit courts of appeals are split with respect to whether a plaintiff must show that she suffered an ultimate

employment action (such as termination, demotion, or a pay cut) in order to recover under Title VII's anti-retaliation clause. The following circuits hold that a plaintiff need not establish that she suffered an ultimate employment action to recover under Title VII's anti-retaliation clause. *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (stating that actions other than discharge are covered by Title VII's anti-retaliation provision and listing as examples, "employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees"); *Yatzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987) (holding that such non-ultimate employment decisions as "[t]ransfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment action' cognizable under " Title VII's anti-retaliation provision); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir. 1996) (construing Title VII's anti-retaliation provisions to reach beyond ultimate employment actions); *Passer v. American Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir. 1991) (holding same, where the defendant cancelled a symposium in the plaintiff's honor after it had learned he had filed an age discrimination action, and stating that "the statute does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer, or demotion").

There is one circuit court of appeal which has held that plaintiffs must prove that the retaliation affected an "ultimate employment decision." *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707-08 (5th Cir. 1997); *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995).

There are two circuits, including the Eleventh Circuit, which have conflicting panel opinions on this issue. The Eleventh Circuit has previously held that for purposes of Title VII's anti-retaliation clause, "[a]n adverse employment action is an ultimate employment decision." *Gupta v. Board of Regents*, 212 F.3d 571, 587 (11th Cir. 2000). However, previous to *Gupta*, the Eleventh Circuit had held that "[w]e join the majority of circuits which have addressed the issue and hold that Title VII's protection against retaliatory discrimination extends to adverse employment actions which fall short of ultimate employment decisions." *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998). In the Eleventh Circuit, *Wideman*, is supposed to be binding because it was the first panel opinion to decide the issue, until the issue is heard by the *en banc* court. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1532 (11th Cir. 1997).

Although these cases were presented to the Eleventh Circuit, the Eleventh Circuit nevertheless refused to hear the issue *en banc*. In fact, the Eleventh Circuit stated that "[c]ontrary to [Petitioner's] assertion, our holding in *Gupta* is not in conflict with *Wideman*." The holdings in *Gupta* and *Wideman* are clearly in conflict.

In *Wideman*, contrary to the district court's interpretation of it, there was no ultimate employment action. Rather, the plaintiff in that case alleged that after she complained of discrimination, she was retaliated against by: (1) being required to work on her day off; (2) receiving two reprimands within the same month when she had not received any reprimands prior to then; (3) her supervisor soliciting negative comments about her; (4) being threatened by the assistant manager when she attempted to contact company headquarters regarding her schedule; and (5) her supervisor needlessly delaying authorization of medical treatment for her.

Id. Given these facts, the defendant argued that the plaintiff failed to show that she suffered an ultimate employment action, and the Eleventh Circuit rejected that argument, and held that: "*We join the majority of circuits which have addressed the issue and hold that Title VII's protection against retaliatory discrimination extends to adverse employment actions which fall short of ultimate employment decisions.*" *Id.* (emphasis added). The court held that the instances of adverse employment action should not be viewed individually, but rather in their totality, and that the totality of the circumstances required the conclusion that a reasonable jury could find that the plaintiff was subjected to actionable adverse employment action.

Moreover, a previous panel opinion by the Eleventh Circuit holds that much of the activity complained of by Petitioner constitutes adverse employment action. In *Taylor v. Runyon*, 175 F.3d 861, 869-70 (11th Cir. 1999), the Eleventh Circuit reversed the grant of summary judgment to the defendant, and in so doing considered all of the following to be adverse employment action: unpleasant and abusive working conditions; denial of recommendations for advanced training courses; two letters of warning; dismissal from an important career management group; and an end to details on reasonable notice to higher-level positions that would have provided her with additional management training.

Most of these exact same things happened to Petitioner, as set forth above in the Statement of Case. Petitioner was subject to extremely abusive working conditions. She was denied training. She was improperly disciplined, and her evaluations were improperly lowered. When she complained, she was told that that was "too bad", and that she had no business being a police officer. Additionally, the people retaliating against her told her not to go to the EEOC, but then continued to retaliate against her.

The Seventh Circuit also has conflicting panel opinions on this issue. *Compare Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) (retaliatory harassment and gossip by plaintiff's fellow workers after filing a sexual harassment complaint was sufficient to constitute adverse workplace actions) *with Smart v. Ball State Univ.*, 89 F.3d 437 (7th Cir. 1996) (requiring that there be an ultimate employment action); *Rabinovitz v. Pena*, 89 F.3d 482 (7th Cir. 1996) (holding same).

Additionally, although this Court has not directly decided this issue, it has indicated that a far less standard than ultimate employment actions are needed to satisfy the adverse employment action element, as it treated a negative employment reference as a sufficiently adverse action to support a retaliation claim of an ex-employee. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

In light of the split in the circuits (and the conflicting panel opinions in two of the circuits) this Court should resolve the quantum of proof in retaliation cases.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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February, 2002

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-10348
Non-Argument Calendar

D.C. Docket No. 98-01181-CV-KMM

RACHAEL PEREZ,

Plaintiff-Appellant,

versus

ALEX PENELAS, Mayor, Miami Dade County Florida,

Defendant,

MIAMI-DADE COUNTY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(October 2, 2001)

Before BIRCH, BARKETT and KRAVITCH, Circuit Judges.

PER CURIAM:

Rachael Perez appeals the grant of summary judgment in favor of Miami-Dade County (the "County") on her retaliation claim under Title VII of the Civil Rights

Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* and the Florida Civil Rights Act of 1992 (the "FCRA"), Fla. Stat. § 760.01 *et seq.* We affirm.

I. Background

Perez began working as a police officer with the Miami-Dade Police Department ("MDPD") in 1993. In July 1995, while assigned to the Northside District, Perez filed a complaint of sexual harassment with the MDPD internal affairs division. In September 1995, Perez requested and received a transfer from Northside to the Intracoastal District. Prior to her arrival, supervisory personnel at Intracoastal learned of Perez's discrimination complaint and allegedly made derogatory statements about her. Perez claims that over the next several years, various supervisors at Intracoastal subjected her to hostile treatment and adverse employment actions in retaliation for filing the complaint.

In particular, Perez complains that on December 21, 1996, Officer Dubocq initiated an investigation against Perez, alleging that Perez had made a false arrest. After the investigation was reviewed by a disposition panel, MPDP issued a disciplinary report in April 1997, recommending a twenty-day suspension without pay. The decision to make the recommendation was allegedly made by Lieutenant Carrel, Perez's supervisor at the time. Upon review and recommendation by a hearing examiner, the county manager reduced the suspension to five days.

On June 30, 1997, Perez filed a discrimination and retaliation charge with the Equal Employment Opportunity Commission ("EEOC"), in which she alleged that

she had been subjected to weekly harassment, denied training, and subjected to disciplinary action in retaliation for filing the 1995 complaint. Perez asserts that the retaliation by her supervisors continued after she filed the EEOC charge.

Perez filed this lawsuit against the county in May 1998, alleging gender discrimination and retaliation under Title VII and the FCRA. The district court granted summary judgment in favor of the County on both claims. Perez solely appeals the district court's ruling on her retaliation claim. She argues that the court erred in finding that there was insufficient evidence that she had suffered an adverse employment action in retaliation for her protected conduct.

II. Discussion

We review the district court's grant of summary judgment in favor of the defendant de novo. *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000). Summary judgment is appropriate only when, viewing the evidence in the light most favorable to the non-moving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.*

In order to establish a prima facie case of retaliation under Title VII, a plaintiff must show that (1) she engaged in statutorily protected activity, (2) an adverse employment action occurred, and (3) the adverse action was causally related to the plaintiff's protected activities. *Little v. United Tech., Carrier Transicold Div.*, 103 F.3d 956, 959 (11th Cir. 1997). It is uncontested that Perez's filing of the

1995 complaint constitutes protected activity. The district court found, however, that Perez failed to present sufficient evidence of an adverse employment action which was causally related to that activity. After careful review of the record, we agree.

This court recognizes that "Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions." *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998). It is equally well settled, however, that "[c]onduct that falls short of an ultimate employment decision must meet some threshold level of substantiality to be cognizable under the anti-retaliation clause." *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 587 (11th Cir. 2000) (quoting *Wideman*, 141 F.3d at 1456).[1] Whether an action is sufficient to constitute an adverse employment action must be determined on a case-by-case basis. *Gupta*, 212 F.3d at 587.

Perez contends that, when viewed as a whole, the following actions by supervisors at MPDP constitute adverse employment action: (1) Captain Linville disparaged her, but not male employees, for taking sick leave; (2) Linville told other supervisors that she had filed a discrimination complaint and could not get along with anybody; (3) Lieutenant O'Connell ordered a sergeant to

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[1] Contrary to Perez's assertion, our holding in *Gupta* is not a conflict with *Wideman*. We specifically stated in *Wideman* that "we do not doubt that there is some threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause." 141 F.3d at 1456.

follow her to see how long she took making calls and told her it was "too bad" if she thought it was harassment; (4) O'Connell lowered her scores on a performance review; (5) O'Connell refused to take the action requested by Perez against a fellow officer who allegedly battered Perez; (6) supervisors denied some of her requests to give swimming instruction; (7) Lieutenant Carrel assigned her to radar duty; (8) supervisors gave her lower test scores than she felt she deserved; (9) Sergeant Buchman gave her a record of counseling for failing to follow his orders and forced her to undergo a fitness for duty test for no apparent reason; (10) supervisors denied certain transfer and training requests;[2] (11) Lieutenant Diers conducted an investigation of her mileage; (12) Diers would not allow her to meet with the director; and (13) the MDPD suspended her for five days without pay for making a bad arrest.

Under the facts of this case, and in light of prior case law, the only action which arguably constitutes an adverse employment action is the five-day suspension without pay.[3] Even viewed collectively, the other actions

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[2] The record shows that Perez was denied a lateral transfer to the Doral District. Contrary to Perez's assertion in her brief, Perez's other requests to transfer to the Canine Unit and the property and Evidence Bureau had not been denied. According to her own testimony, Perez had been placed on a list of qualified applicants for those transfers.

[3] *See Lucas v. WW. Grainger, Inc.*, 257 F.3d 1249, 1261 (11th Cir. 2001) (holding that negative performance evaluations standing alone do not constitute adverse employment actions); *Hinson v. Clinch County, Ga. Bd. of Educ.*, 231 F.3d 821, 829 (11th Cir. 2000) (holding that transfer to different position must involve reduction in pay, prestige or responsibility to be

were not "objectively serious and tangible enough to alter [the plaintiff's] compensation, terms, conditions, or privileges of employment, deprive . . . her of employment opportunities or adversely affect[ ] . . . her status as an employee."[4] *Gupta*, 212 F.3d at 588 (citation and internal marks omitted). Because those actions do not rise to the level of an adverse employment action, we consider only whether Perez showed sufficient evidence that the suspension was causally related to her protected activities.

To establish a causal connection, "a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." *Coutu v. Martin County Bd. of County Comm'rs*, 47 F.3d 1068, 1074 (11th Cir. 1995) (citation omitted). A plaintiff may satisfy this element "by providing sufficient evidence that the decision-maker became aware of the protected conduct, and that there was close temporal proximity between this

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considered "adverse"); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1301 (3d Cir. 1997) (holding that "unsubstantiated oral reprimands" and "unnecessary derogatory comments" do not rise to level of adverse employment action); *see also Gupta*, 212 F.3d at 587 ("Title VII[ ] is neither a general civility code nor a statute making actionable the ordinary tribulations of the workplace.").

[4] Despite the alleged reprisals, the evidence shows that Perez received a merit pay increase every year, that she had been permitted to give swimming instruction on several occasions, that she had been approved for certain training, and that she had never been given an annual rating lower than satisfactory. Furthermore, Perez presented no evidence that her test scores, the denial of her training request, or the comments by her supervisors affected her employment status or opportunities.

awareness and the adverse employment action." *Farley v. Nationwide Mutual Ins. Co.*, 197 F.3d 1322, 1337 (11th Cir. 1999). It is undisputed that Carrel, the supervisor who recommended Perez's suspension, was aware that Perez had filed a discrimination complaint while at Northside. Nevertheless, Perez filed the complaint in July 1995 and the recommendation to suspend her was not made until April 1997 – almost two years later. In our estimation, this is insufficient temporal proximity to create a genuine issue of material fact as to causation. *See Maniccia v. Brown*, 171 F.3d 1364, 1370 (11th Cir. 1999) (holding that 15-month gap between protected activity and adverse employment action was too long to establish causation). Moreover, we agree with the district court that Perez failed to present other evidence that raises an inference of causality.

Perez argues that, in addition to the filing of the 1995 complaint, she also engaged in several other protected acts which we should consider in analyzing causality. The other acts include (1) informing Carrel in May 1996 that she was going to seek assistance from the EEOC; (2) filing the EEOC charge in July 1997; and (3) filing this lawsuit in 1998. Initially, we note that Perez did not file the EEOC charge or this lawsuit until after she received the suspension. Thus, the suspension could not have been in retaliation for those activities.

Furthermore, assuming arguendo that the first act constitutes protected activity, Perez did not allege in her EEOC charge that she was retaliated against for informing supervisors that she was going to speak with the EEOC. The former Fifth Circuit has held that the "scope" of the judicial complaint is limited to the "scope" of the

EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. *See Ray v. Freeman*, 626 F.2d 439, 443 (5th Cir. 1980) (citation omitted).[5] Reviewing the EEOC charge, we agree with the district court that this allegations of a protected activity expands Perez's present action beyond that which would normally arise from the EEOC investigation of her retaliation claim based on the 1995 complaint.[6] Moreover, Perez did not even include this particular allegation in her complaint, asserting it only in her opposition to the County's motion for summary judgment. Therefore, we decline to consider it on appeal.

III. Conclusion

Because Perez failed to provide sufficient evidence of an adverse employment action that was causally related

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[6] Perez correctly notes that when retaliation is taken against an employee for filing a charge of discrimination, the employee does to have to file a second charge of retaliation for purposes of exhausting administrative remedies because the retaliation claim is "ancillary" to the original charge. *Gupta*, 654 F.2d at 413-14. That principle does not apply in this particular situation because Perez is claiming that she was suspended for engaging in a protected activity that took place *prior* to the filing of the EEOC charge. Therefore, this claim of retaliation logically could not be "ancillary" to the original charge.

to the 1995 complaint, we affirm the district court's entry of summary judgment in favor of the County.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 98-1181-CIV-MOORE

RACHEL PEREZ,

Plaintiff,

vs.

MIAMI-DADE COUNTY,

Defendant.

_____/

ORDER

CLOSED CIVIL CASE

THIS CAUSE came before the Court upon Defendant's Motion for Summary Judgment (DE # 47). Upon consideration of the Motion and the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

Background

Plaintiff has been employed as a police officer with the Defendant, Miami-Dade Police Department ("MDPD"), since her graduation from the police academy in 1993. The following claims are derived from the joint pretrial stipulation, Plaintiff's statement of disputed facts, and excerpts of her deposition submitted in support of her opposition to the present motion.

In July of 1995, while working at the Northside District, Plaintiff filed a complaint of sexual harassment with

the Internal Affairs Section.[1] In September of 1995, she requested and received a transfer from Northside to the Intracoastal District, where she remains employed today. Perez worked under her first few supervisors at Intracoastal without any complaint. Over the years, however, Plaintiff has allegedly suffered many disagreements and unpleasantries from her supervisors and coworkers. In October of 1995, Capt. Linville allegedly called her a troublemaker, and said that he knew that her transfer from Northside was related to her complaint of sexual harassment. He reportedly disparaged her to other personnel, implying that she was lazy for not returning to work sooner following her wrist surgery, and that she could not get along with her coworkers. Linville allegedly twice denied Plaintiff's request to teach swimming classes at the police academy.

In February of 1996, she requested and, based on her seniority, received a shift change to the day shift. Her new supervisor, Lt. O'Connell, ordered a sergeant to follow Plaintiff to see how long she took making her calls. She complained about this order, to which he responded that it was "too bad" if she thought it was harassment. In that same month, O'Connell allegedly lowered Plaintiff's scores on a performance review.[2] On another occasion, Perez demanded that O'Connell take formal action

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[1] The allegations relating to that complaint are not part of her present lawsuit.

[2] Her scores had been in the "above satisfactory" area, and had been changed with whiteout and moved to "satisfactory." Plaintiff thinks some may have been changed to "below satisfactory." *See* Plaintiff's Depo. at 123.

against a fellow officer who allegedly battered her, but he did not pursue the matter to her satisfaction.[3]

Plaintiff went to Major Gentile in February and May of 1996 to complain about the hostile treatment she perceived from her supervisor. She advised the Major at the latter meeting that she had no alternative but to seek assistance from the EEOC. Lt. Carrel, her new supervisor, was present at the meeting. In a conciliatory effort, he tried to dissuade her from involving the EEOC. Thereafter, he allegedly told her that he was aware of her 1995 complaint, that he was tired of hearing about sexual harassment, and that he did not think she should be a police officer. In December of 1996, Lt. Carrel suspended Plaintiff for twenty days for making a bad arrest.[4] The other officer involved in the incident was also suspended for twenty days without pay or benefits.[5] Upon review by a hearing examiner, the suspension was reduced to five days.

Perez does not complain about her subsequent supervisor, but claims the discrimination resumed under Sgt. Schimek. Plaintiff alleges that Schimek gave her performance scores that were lower than those he gave to the

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[3] It is not entirely clear, but it appears that this complaint refers to an incident in which both Perez and Officer Dubocq filed complaints about each other, and both received a record of counseling.

[4] Plaintiff stated that the suspension was the catalyst behind her decision to file a charge of discrimination with the EEOC on June 30, 1997.

[5] *See* Plaintiff's Statement of the Case, in Joint Pretrial Stipulation, at 2. Officer Dubocq, again, was the second officer involved in the incident.

male officers. Plaintiff alleges the discrimination continued under her next supervisor, Sgt. Buchman, who she claims displayed a general animus towards women. She claims he lowered the scores on her first evaluation under his supervision, and disciplined her for failing to follow his orders relating to a particular arrest, though Perez contends that she had received conflicting orders from the Robbery division relating to that suspect. In the spring of 1998, Buchman required Plaintiff to undergo a "fitness for duty" examination, which she passed, but he did not give her a satisfactory reason for giving her this order.

Her next supervisor, Lt. Diers, allegedly conducted a sham investigation of Plaintiff's mileage reimbursement. Plaintiff asserts that he investigated one other officer along with Plaintiff, so as to hide the fact that he was singling her out. He purportedly did not like Perez because she filed a charge of discrimination and because she was suing the county. Diers told Plaintiff that all of her prior supervisors had had problems with her.

In 1998, Plaintiff sought a transfer to the Doral district, which was denied by that district; she made transfer requests to other units, which were similarly denied; and she requested additional training[6] from her own district, which was also denied. Plaintiff alleges that two male officers were granted training requests. Despite all this, Plaintiff received satisfactory performance ratings and a

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[6] Plaintiff requested training for photography and narcotics. She was advised that this training was unnecessary for a road patrol officer.

merit pay raise every year. She has received over 200 hours of training in her employment with the MDPD.

Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Summary judgment may be entered only where there is *no* genuine issue of material fact. *See Twiss v. Kury*, 25 F.3d 1551 (11th Cir. 1994). The moving party has the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In applying this standard, the district court must view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. *Id.* at 157.

However, the non-moving party

> [m]ay not rest upon the mere allegations and denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Fed. R. Civ. P. 56(e). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will

be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). In fact,

> the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The failure to present proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment. *Id.*

The difficulty in deciding this Motion lies in the lack of clarity in Plaintiff's claims. Count I of the complaint states that Defendant's conduct constituted a hostile environment violation.[7] However, Plaintiff's opposition to the present summary judgment motion denies any hostile environment allegation. The Court treats Count I, which alleges "Gender Bias," as a claim for disparate treatment

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[7] Her evidence includes testimony that some MDPD personnel demonstrated animus towards women. Such evidence only becomes relevant once she establishes her prima facie case of discrimination. *See Jones v. Bessemer Carraway Med. Ctr.*, 151 F.3d 1321, 1323 n.11 (11th Cir. 1998) ("racial animus may be significant evidence of pretext once a plaintiff has set out the prima facie case").

on the basis of her gender, and Count II as a claim of retaliation.

Initially, Defendant argues that Plaintiff's claims beyond the 300-day period preceding her charge of discrimination are time-barred. This Court agrees. While equitable tolling may permit a plaintiff to seek relief for violations that occurred more than 300 days before filing her complaint with the EEOC, Plaintiff must show that the violation was part of a continuing violation that justifies waiving this procedural bar. If the violations involved the same type of discrimination, were frequently occurring (as opposed to isolated or sporadic), and lacked the degree of permanence necessary to trigger an employee's awareness that her rights have been compromised, then the plaintiff may proceed on these otherwise time-barred claims. *See, e.g., Blalock v. Dale County Brd. of Educ.*, 84 F. Supp.2d 1291, 1306 (M.D. Ala. 1999).

Though Plaintiff's claims are somewhat related in subject matter, the alleged violations came from various supervisors over a course of several years. More significantly to Plaintiff's case, Perez cannot deny that she was aware in early 1996 that a potential violation of her rights had occurred when she told her supervisor that she felt she had no alternative but to seek intervention by the EEOC. She did not file a charge for more than one year after that statement, but she was clearly aware then at least of her own belief that her rights had been violated. *See id.* at 1307 (finding that where plaintiff admitted her belief, at the time of alleged incident, that she had suffered discrimination, she could not later use her EEOC charge to "bootstrap a career of alleged gender-based

inequities"). Consequently, claims arising before September 4, 1996, will not be considered with regard to her federal claims; claims arising before June 30, 1996 will not be considered with regard to her state claims.

Disparate Treatment

To prevail on her claim of disparate treatment, Plaintiff must allege that she was treated differently by her employer than other employees and that the disparate treatment was motivated by a discriminatory intent. *See EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1273 (11th Cir. 2000) (requiring proof that "defendant choose a course of action at least in part because of, not merely in spite of, its adverse affects on an identifiable group"). Plaintiff has not offered direct evidence of discrimination.[8] She then bears the burden of proving discrimination by satisfying the four-prong test developed in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973), showing: 1) that she is a woman; 2) that she applied for and was qualified for a position she sought; 3) that, despite her qualifications, she was denied the requested position; and 4) that after her rejection, the employer sought applications from or filled the position with someone outside of her protected group. *See id.* at 802. The *McDonnell-Douglas* test may be adapted to the factual situation alleged herein

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[8] Direct evidence speaks directly to the discriminatory intent as well as to the specific action in question. *See Burrell v. Board of Trustees of Ga. Military College*, 125 F.3d 1390, 1394 n.7 (11th Cir. 1997). Plaintiff was asked throughout her deposition if her alleged offenders ever mentioned her gender as a motivating factor. She consistently stated that they had not.

by showing that Plaintiff was subject to adverse employment decisions, and that similarly situated male officers received dissimilar treatment. *Accord Hodges v. Stone Savannah River Pulp & Paper Corp.*, 892 F. Supp. 1571, 1678 (S.D. Ga. 1995) (applying the test to a denial of transfer claim). Plaintiff bears the burden of showing that she and the male officers "are similarly situated in all relevant respects." *Holifield v. Reno*, 115 F.3d 1555, 1565 (11th Cir. 1997).[9] Plaintiff must further adduce evidence to support her assertion of a causal connection between her gender and the disparate treatment. *See Blalock*, 84 F. Supp.2d at 1308.

The above framework is not a bright-line test but rather identifies facts from which a plaintiff may raise a presumption of discrimination. The Court finds it necessary in this case to follow the framework strictly, because Plaintiff's testimony generally undercuts her own allegations that her superiors were motivated by a gender-based discriminatory intent. Throughout her deposition,

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[9] In *Malladi v. Brown*, 987 F. Supp. 893 (M.D. Ala. 1997) the court stated:

> "To be deemed 'similarly-situated,' the individual with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. . . . The simple allegation that there was someone else, without an adequate showing that she is similarly-situated in all relevant respects, fails to make out a prima-facie case." (citations omitted). *Id.* at 909-10.

after describing each alleged instance of discrimination, Plaintiff was asked if the offender expressed any discriminatory intent at the time, or what made her think that the incident was precipitated by gender discrimination.[10] She could not, or did not, identify a basis for believing that it was gender-related. In fact, she repeatedly denied that her various supervisors mistreated her because of her gender, but rather because of what they had been told about her by others: that she was a troublemaker, that her prior supervisors had had a problem with her, or that she had filed a charge of discrimination before transferring to the Intracoastal district. When she complained to her supervising Captain, she did not claim that she received disparate treatment because of her gender. The Court will examine each of Plaintiff's claims, for which she provided evidence of a basis of comparison between herself and another officer, from which a jury could find that she was treated in a discriminatory manner.

In approximately November or December of 1995, following her wrist surgery, Plaintiff alleges that Captain Linville treated her unfairly, and discriminated against her on the basis of sex. She claims that he treated "a few male officers who had very minor injuries"[11] more favorably than Plaintiff. Perez cannot proceed on this claim

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[10] Plaintiff does not identify for the Court what employment decisions form the basis of this claim but rather incorporates by reference the retaliation section of her Response. The Court relied primarily on the selected excerpts of her deposition that she attached to her opposition to the present motion to determine whether her evidence could support a claim of disparate treatment.

[11] Plaintiff's Depo. at 101.

first, because it is time-barred, as well beyond the 300 days prior to filing her EEOC complaint.[12] Plaintiff urges the Court to consider these barred claims because she asserts that they establish a context of discrimination. However, she has failed to produce evidence that she was treated differently than the male officers. The allegedly adverse treatment, that Linville complained about her use of sick leave during her recovery, may or may not have been bestowed upon the male officers: Plaintiff testified that she "ha[d] no idea."[13] She has not supported her suspicion that she received disparate treatment with any competent evidence and thus her claim fails to state a Title VII violation.

Plaintiff likewise complains that Sgt. Schmick gave higher performance ratings to male officers than he gave to her. She alleges in her deposition that an overweight officer received a better physical condition rating than

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[12] Plaintiff's other complaints about Lt. O'Connell, that he ordered Plaintiff's supervisor to follow her around to see how long she took answering on calls, and that he changed her February 1996 performance scores, are similarly time-barred.

[13] Plaintiff raises similar complaints relating to a fitness for duty test that she was required to undertake: she claims that male officers, who used more sick-time than she did, were not required to undergo a fitness test. However, she fails to present facts showing that the comparison is valid – that the officers were similarly situated in relative use of sick leave, or any other factors that may contribute to a supervisor's decision to send an officer for fitness testing. Further, Robert Williams's deposition, offered to support Plaintiff's opposition, stated that Plaintiff was not the only one written up for fitness for duty.

she did.[14] Plaintiff does not assert that she received a poor rating, or even that her rating was inaccurate or unfair to her. Nor has she connected these ratings to any employment decision, for example, that her merit raise was less than that of the male officer, based on their respective scores. The Court simply cannot examine something as personal, and individual to each officer, as a performance rating, standing alone, and infer any gender-based disparate treatment. The record does not support Plaintiff's suspicion that her superiors based her ratings on her gender rather than her performance.

Plaintiff claims that she was denied training. She has not, in her pleadings, tied this denial to either the disparate treatment or retaliation claim; however, because Sgt. Soperman's deposition states that two other officers were approved for the training, the Court will consider this as an allegation of disparate treatment. Plaintiff has not offered evidence of similarity between herself and these two officers, which leaves the Court to assume, without any support, that all officers are similarly situated. The Court is reluctant to make that assumption without the benefit of any support therefore. Also, Sgt. Soperman's testimony reveals that the other officers worked for a different sergeant than did Plaintiff.

Plaintiff has failed to produce evidence of a similarly situated male officer who received better or different

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[14] *See* Amended Complaint, para. 13. She also complains about scores given to a male Public Service Aid, but he was not even a fellow officer, and Plaintiff has not argued that he was similarly situated to her. She has not provided a basis for the comparison from which the Court could consider the claim.

treatment. Her deposition testimony further reveals an ignorance of surrounding circumstances – critically, of how similarly situated male officers were treated. Her conclusory claims that males received better scores, without producing any evidence from which it may even be inferred that she was equally or better qualified, will not carry her burden at summary judgment. There is simply nothing in the record from which a reasonable jury could determine that her supervisors treated her disparately, much less that they were motivated by a discriminatory intent in so doing.

Retaliation

Plaintiff's prima facie case of retaliation depends on her showing: that she engaged in a protected activity under Title VII; that she suffered an adverse employment action; and that the adverse action is causally connected to the protected activity. *See Little v. United Technologies*, 103 F.3d 956, 959 (11th Cir. 1997). Pursuant to the burden-shifting scheme developed in *McDonnell-Douglas*, once Plaintiff has raised the presumption of retaliation, then Defendant bears the burden of producing evidence that they made the questioned employment decision for a legitimate, nondiscriminatory reason, which must be "clear and reasonably specific." *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 258 (1981). Plaintiff then bears the burden of persuasion that the proffered reasons are pretextual. *McDonnell-Douglas Corp.*, 411 U.S. at 802.

Plaintiff's EEOC charge complains that following the filing of her 1995 complaint she has been denied training, subject to disciplinary action, and "subjected to weekly

harassment."[15] Relying primarily on her deposition testimony, the Court has identified the following conduct as the basis of this complaint: that she was denied training for narcotics and photography; that she was suspended for five days in 1996; and that her supervisors treated her more harshly than other officers, with respect to her patrol assignments and performance ratings.

In order to establish the causal nexus between her complaint and the alleged retaliation, Plaintiff need only establish that "the protected activity and the adverse action were not wholly unrelated." *Goldsmith v. City of Atmore*, 996 F.2d 1155 (11th Cir. 1993). The Eleventh Circuit has characterized Plaintiff's burden as "exceedingly light," requiring at least that the employer was aware of Plaintiff's complaint at the time of the adverse employment decision. *See Perryman v. Johnson Prods. Co.*, 698 F.2d 1138, 1142 (11th Cir. 1982). Perez has clearly testified that her supervisors were all aware of her 1995 complaint. The alleged retaliation occurred two years after the complaint, in a different police district; and while Plaintiff alleges that her supervisors made reference to the charge at various times, she has not testified that they did so in conjunction with the allegedly retaliatory acts. She conceded in her deposition that she did not believe that any hostility she suffered from Officer Dubocq, the officer

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[15] In her opposition to the present motion Perez suggests that she engaged in several protected acts, specifically that she complained about discrimination more than the once; however, her EEOC charge identifies only the 1995 complaint. The scope of the judicial action is determined by her EEOC charge, and Plaintiff is barred from expanding her present action beyond that which would normally arise from the EEOC investigation.

who initiated the complaint that resulted in her suspension, was motivated by discriminatory motives but rather by a personal dislike for Plaintiff. She denied any assertion that the hearing examiner, who upheld her suspension, was motivated by an intent to discriminate or retaliate against her. Plaintiff relies on awareness alone to prove the causal link.

Plaintiff has offered one case to support her assertion that the presumption of retaliation survives over a year separation between the events. *See Beckwith v. City of Daytona Beach Shores*, 58 F.3d 1554 (11th Cir. 1999). Plaintiff's reliance on this case is poorly placed, as the Eleventh Circuit therein reviewed the record and found that, as a matter of fact, the retaliatory firing was the culmination of adverse actions that began almost immediately following the plaintiff's exercise of his First Amendment rights. *Cf., Sicalides v. Pathmark Stores, Inc.*, No. Civ. A. 99-CV-3465, 2000 WL 760439 (E.D. Pa. June 12, 2000) (finding that a seven-month gap between the complaint and the harassment refuted existence of the requisite causal link) (*citing Hughes v. Derwinski*, 967 F.2d 1168, 1174 (7th Cir. 1992)). A weak causal link would not be fatal to Plaintiff's suit if it was clearly attached to a distinct and cognizable adverse employment action, but Plaintiff's complaint fails to connect her employer's awareness of her 1995 charge to an adverse action recoverable under Title VII.

An adverse employment decision is an "ultimate employment decision, such as discharge or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment. . . . Conduct that falls short of an ultimate employment decision must meet some threshold level of substantiality to

be cognizable under the anti-retaliation clause." *Gupta v. Florida Board of Regents*, 212 F.3d 571, 587 (11th Cir. 2000) (citations and internal quotation marks omitted); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998). An action is adverse if it affects a term or condition of employment, causes material change in job duties, affects opportunities for advancement or pay increases, or otherwise "constitutes a significant change in employment status . . . or a decision causing significant changes in benefits." *Burlington Indus. v. Ellerth*, 524 U.S. 742, (1998); *see also McCabe v. Sharrett*, 12 F.3d 1558, 1564 (11th Cir. 1994).

The Eleventh Circuit has rejected claims that internal records of counseling constitute adverse action capable of supporting claims of retaliation. *See Graham v. State Farm Mutual*, 193 F.3d 1274, 1283 (11th Cir. 1999) (affirming summary judgment against plaintiff who complained about employer's determination that she had been absent without leave, and about placement of a memorandum in her personnel file regarding her excessive absence, because "plaintiff did not suffer any repercussions from either of these actions."); *see also Matthews v. City of Gulfport*, 72 F. Supp.2d 1328, 1338 (M.D. Fla 1999) (rejecting plaintiff's claim that employer's failure to provide back-up for female police officer is an adverse action). Minor and trivial actions that upset the employee, unsubstantiated oral reprimands, and unnecessary derogatory comments do not rise to the level of adverse employment action to support a retaliation claim. *Accord, Robinson v. City of Pittsburgh*, 120 F.3d 1289, 1300-01 (3d Cir. 1997).

Plaintiff testified that she received a merit pay increase every year. She has not shown that she ever

received an unsatisfactory performance rating; she simply asserts that she felt she deserved even higher scores than she received. She may be right, but she has failed to allege that her satisfactory scores adversely affected her employment opportunities. For example, Plaintiff has not alleged that, had she received the scores to which she was entitled, she would had earned a higher pay raise, or advanced in seniority, or enjoyed any change in employment status that would meet the threshold level of substantiality contemplated by *Wideman*, the case on which Plaintiff relies for this very principle.

Conclusion

Plaintiff has failed to present competent evidence that she was subjected to either disparate treatment or that she suffered an adverse employment action in retaliation for her complaint of discrimination. It is thus ORDERED AND ADJUDGED that the Defendant's Motion for Summary Judgment be, and the same is, hereby GRANTED.

This case is CLOSED. All pending motions are DENIED as MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 20th day of December, 2000.

/s/ K. Michael Moore
K. MICHAEL MOORE
UNITED STATES
DISTRICT JUDGE

copies provided:
Eric A. Rodriguez, Esq.
Loring N. Spolter, Esq.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-10348-CC

RACHAEL PEREZ,

Plaintiff-Appellant,

versus

ALEX PINELAS, Mayor, Miami Dade County, Florida,

Defendant,

MIAMI-DADE COUNTY,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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(Filed Nov. 21, 2001)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: BIRCH, BARKETT and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service

on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
NOV 7 2002
OFFICE OF THE CLERK

No. 02-269

In The

Supreme Court of the United States

RACHEL PEREZ,

Petitioner,

v.

MIAMI-DADE COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

Whether the Court should review the Eleventh Circuit's unpublished per curiam affirmance of an unpublished district court's final summary judgment disposing of Petitioner's claim of retaliation under Title VII of the Civil Rights Act where the record does not support many of the assertions in the Petition and where the standard applied by the district court was in accord with the law of the Eleventh Circuit and the majority of the other circuits and where the purportedly conflicting law cited by Petitioner would yield the same result in this case as the Eleventh Circuit's per curiam affirmance.

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RESTATEMENT OF THE CASE AND FACTS

The Court of Appeals for the Eleventh Circuit in an unpublished opinion affirmed, per curiam, the district court's final summary judgment dismissing the Petitioner's claim of retaliation under Title VII[1] of the Civil Rights Act.[2]

The Court of Appeals determined that the district court was correct in concluding that none of the alleged actions during the limitations period were adverse employment actions in retaliation for Petitioner's 1995 complaint of discrimination and that much of the alleged actions were undermined by the record and Petitioner's own testimony. The Court of Appeals also held that the actions Petitioner complained of failed to meet the threshold level of substantiality required by the Eleventh Circuit.

The facts relied on by the district court and the Court of Appeals were derived almost entirely from facts stipulated in the Pretrial Stipulation and the deposition testimony of the Petitioner.

Respondent Miami-Dade County ("the County") is a political subdivision of the State of Florida. The Miami-Dade County Police Department ("MDPD") is a department of Miami-Dade County. The County has an established policy prohibiting discrimination on the basis of sex,

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[1] 42 U.S.C. §§2000e et seq.

[2] The district court also granted summary judgment on Petitioner's disparate treatment claim on the basis of gender, but Petitioner did not appeal the summary judgment on that ground to the Court of Appeals.

prohibiting retaliation, and prohibiting sexual harassment. The County also has several avenues for an employee to complain of discrimination, harassment and retaliation.

At the time of the district court's decision, the Petitioner was a sworn police officer with the County in the Miami-Dade Police Department and had been continuously employed by the County since she was hired as a police officer trainee in 1992. In 1993, Petitioner became a sworn probationary police officer assigned to MDPD's Northside District police station (hereafter "Northside"). Petitioner received training on the policy against sexual harassment and discrimination and was aware of MDPD's policy against discrimination as early as 1994 and was aware that for purposes of discrimination she could have gone to her supervisor, to the Professional Compliance Bureau and she could have gone to the EEOC.

During 1994, Petitioner became certified as a swim instructor as a result of training provided by MDPD. On occasion, instead of reporting to Northside for routine patrol work, Petitioner would serve as a swim instructor for police trainees at MDPD's Training Bureau. Petitioner had no complaints during her tenure at Northside about her opportunities to serve as a swim instructor at MDPD's Training Bureau.

On or about July 19, 1995 [while employed at Northside], Petitioner complained to MDPD's Professional Compliance Bureau ("PCB") (previously known as Internal Affairs) about a sexual remark made by another officer and other matters. This internal complaint is not the subject of this case but is the only protected activity cited by the Petitioner's EEOC Charge.

After the July 1995, complaint to PCB, Petitioner requested to be transferred to the Intracoastal District police station. MDPD granted Petitioner's request to transfer to the Intracoastal District police station and in September 1995 Petitioner was transferred to the Intracoastal District police station.

From the time Petitioner lodged her internal complaint of discrimination in July 1995 through the end of 1995, the Pretrial Stipulation and Petitioner's deposition show the following undisputed facts: (1) Petitioner's request to transfer to Intracoastal District station was granted, (2) Petitioner was permitted to teach swimming at the pool for one week in September 1995 instead of reporting to road patrol, (3) Petitioner's first supervisor,[3] Sgt. Amabile, wrote "Welcome to the squad" on her first monthly report,[4] (4) Petitioner received a commendation in October 1995, (5) Petitioner received an above satisfactory annual evaluation in November 1995, (6) Petitioner received a pay raise, (7) Petitioner received eight hours of training, (8) Petitioner admitted that she had no problems

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[3] At MDPD in a district station such as the Intracoastal District station, an officer's supervisor is a Sergeant ("Sgt.") and then the next person up the chain of command is a Lieutenant ("Lt.").

[4] After every month, police officers at MDPD prepare a "daily/monthly officers activity report" (hereafter "monthly report") where they list each of the activities completed on every day of the month such as felony arrests, number of cases, number of moving violations, etc. After the officers fill out the report, it is given to the supervisor, who reviews it, gives the officer ratings and then returns it to the officer. On the bottom of the monthly activity report, the supervisor gives the officer ratings from 1-9 in 27 different categories. Petitioner's references to monthly evaluations or scores refer to these monthly reports.

with her first two supervisors, Sgt. Amabile and then Sgt. Flaherty and that they treated her fine, (9) Petitioner admitted that her first Lieutenant for the first four months at Intracoastal, Cliff Nelson, treated her fine and did not discriminate or retaliate against her, and (10) Petitioner did not suffer any discipline for any reason.

1996

In February 1996, Petitioner bid for the day shift and began reporting to Sgt. Marlene Campbell and the Lieutenant in the chain of command became Lt. Tim O'Connell. Petitioner states that when she first started working for Sgt. Campbell she did not have any problems with her and that other than adjusting her score on her February 1996 *monthly* evaluation, there was nothing else that Sgt. Campbell did that Petitioner did not agree with. Petitioner concedes that she did not complain about her monthly evaluation scores being lower because she was a woman. Petitioner stated that Sgt. Campbell never said anything sexist or discriminatory. From July 1-5, 1996 (with July 4th off), MDPD permitted Petitioner to teach swimming in lieu of her usual duty of working the road. Petitioner was supervised by Sgt. Campbell through August 1996. After Sgt. Campbell, Petitioner's next supervisor was Sgt. Ver Straten. Petitioner stated that she had no problem with Sgt. Ver Straten.

For 1996 Petitioner Receives A Pay Raise and A Satisfactory Evaluation

On November 2, 1996, MDPD gave Petitioner her annual evaluation in which she was rated satisfactory and granted a pay increase. The evaluation noted that

Petitioner's enforcement statistics were below the platoon average. Petitioner conceded that the satisfactory annual evaluation in 1996 did not *damage her in any way*. If the annual satisfactory evaluation in 1996 did not damage her in any way, then the alleged lowering of a category from one monthly evaluation in February 1996 that nevertheless resulted in a satisfactory annual evaluation could not have damaged her employment status and could not be an adverse employment action.

Officer Dubocq Initiates Investigation Into Petitioner's False Arrest of A Subject

On or about December 21, 1996, a Professional Compliance Bureau investigation was initiated by Officer Dubocq against Petitioner in which Dubocq alleged that Petitioner had falsely arrested a subject and then falsified the arrest report. Petitioner did not believe that Officer Dubocq's initiation of the complaint "had anything to do with gender bias" and it appeared that it was a personal issue between them because Petitioner stated that "I do believe it was a problem Officer Dubocq had with me."

In summary, the year 1996 comes to a close, more than 17 months after Petitioner's internal complaint of discrimination at another police station (Northside), and Petitioner was welcomed to her squad, received two raises, an above satisfactory annual performance evaluation in 1995, a satisfactory annual performance evaluation in 1996, and had two separate weeks teaching swimming at the pool.

1997

Petitioner's New Supervisor Is Sgt. Bibi Alonso With Whom Petitioner Has No Problem

Petitioner's supervisor commencing in January 1997 was Sgt. Bibi Alonso. Sgt. Alonso supervised Petitioner until April 1997 and Petitioner stated that she had no problems and no discrimination with Sgt. Alonso. During February 1997, Petitioner wrote a memorandum to Sgt. Alonso explaining that Petitioner had lost a gun that had been issued to her. Petitioner conceded in her Eleventh Circuit Brief that she was never disciplined for anything having to do with the missing revolver. Also during February 1997, Petitioner was permitted to teach swimming at the Training Bureau instead of patrolling the streets.

June 1997

After the completion of the investigation into Petitioner's false arrest of a subject, a disposition panel was convened to review the investigation. The disposition panel sustained the allegations against Petitioner. On the basis of the investigation and the disposition panel's sustaining of the allegations against her, the Director of MDPD, issued a letter to Petitioner dated June 3, 1997, that imposed a twenty-day suspension, and advised Petitioner of her right to appeal the suspension under the County's civil service procedure for appealing discipline.

An Independent American Arbitration Association Hearing Examiner Found That Respondent Was Justified In Suspending Petitioner

Petitioner appealed the suspension pursuant to the County's civil service procedure provided by 2-47 of the

County Code. The Pretrial Stipulation stipulated to the following facts. A neutral Hearing Examiner, appointed through the American Arbitration Association, presided over a hearing on Petitioner's suspension. At the hearing, Petitioner was represented by counsel and was able to present evidence and witnesses.

The Hearing Examiner found that Petitioner had engaged in conduct unbecoming an officer in violation of MDPD rules and sustained the suspension. The Hearing Examiner recommended, however, that the suspension be reduced from twenty days to five days. The County Manager concurred with the Hearing Examiner's report and recommendation and took final action in which he upheld the suspension but reduced the suspension to five days and ordered that Petitioner be reimbursed for fifteen days of pay, which was done by MDPD.

Petitioner testified that the Hearing Examiner that upheld her suspension does not work for the County. Petitioner also testified that the Hearing Examiner did not discriminate against her as a woman and that the Hearing Examiner did not retaliate against her.[5]

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[5] The fact that an independent Hearing Examiner heard the testimony regarding the conduct at issue in the suspension and made a determination that the Petitioner had violated MDPD rules and that the suspension was justified breaks any potential chain of causation between any alleged retaliation and the County Manager's decision to suspend the Petitioner. *See Stimpson v. City of Tuscaloosa*, 186 F.3d 1328 (11th Cir. 1999). The decision also proves that the County had a legitimate non-retaliatory reason for suspending the Petitioner which defeats her claim.

Petitioner testified that the five-day suspension does not affect her ability to be promoted to sergeant. Petitioner did not have to pay fees to the PBA attorney that represented her at the hearing on the suspension. Petitioner admitted that she has not lost any pay other than the five-day suspension.

June 30, 1997 – Petitioner Files EEOC Charge Because of Suspension

On June 30, 1997, Petitioner filed a charge of sex discrimination and retaliation with the Equal Employment Opportunity Commission ("EEOC"). Petitioner testified that the "catalyst" for filing the charge of discrimination with the EEOC was the suspension. The EEOC Charge alleges that the retaliation Petitioner allegedly suffered was the result of her 1995 internal complaint of discrimination and cites no other protected activity as a basis for retaliation.

Petitioner Has No Problems With Supervisor Sgt. Estis And Receives An Above Satisfactory Evaluation and Pay Raise In 1997

Petitioner was also supervised during 1997 by Sgt. Pete Estis. Petitioner stated she got along with Sgt. Estis, had no problems with him, and Sgt. Estis never said anything sexist and never did anything discriminatory.

On December 17, 1997, Petitioner was presented with an annual evaluation in which she was rated above satisfactory. Petitioner did not disagree with the overall rating. On December 17, 1997, MDPD also granted Petitioner a pay increase.

1998

The year 1998 begins, almost two and one-half years after Petitioner's July 1995 internal complaint of discrimination and Petitioner has received three raises, spent three weeks teaching at the pool, and received three annual evaluations, two which were above satisfactory and one satisfactory.

In 1998, Petitioner was supervised for one shift by Sgt. Buchman. Petitioner was asked twice and she testified that Sgt. Buchman had never said anything to Petitioner about being a woman and she also testified that Buchman never said anything sexist to her. Petitioner took issue with Sgt. Buchman over the handling of a call involving a robbery suspect, but acknowledged that she was not issued discipline over the issue.

Petitioner's next supervisor, beginning in May 1998 for two shifts (approximately 8 months), was Sgt. Sharon Soderman. Petitioner had no problems and no discrimination from Sgt. Soderman. Petitioner's Lieutenant during this period was Lt. Diers. Petitioner did not believe that Lt. Diers discriminated against her. Petitioner testified that Lt. Diers never said anything to her about being a woman and that Lt. Diers never said anything sexist to her. During this period in 1998, the Captain at Intracoastal was Captain Heller. Petitioner testified that she did not feel she was treated more harshly under Captain Heller.

December 1998 – Once Again Petitioner Receives A Raise and An Above Satisfactory Annual Performance Evaluation

On December 14, 1998, MDPD granted Petitioner an increase in pay. Petitioner also received an annual evaluation in December 1998 with a rating of above satisfactory from Sgt. Soderman and Lt. Diers.

1999

Petitioner believes that she had a meeting with Major McGee [Commander of Intracoastal] on or about January 5, 1999. Petitioner has had no problems with Major McGee and does not feel that Major McGee has discriminated or retaliated against her and has not suffered any problems thereafter with Lt. Diers. Petitioner's next supervisor was Sgt. Lombardi. Petitioner testified that she has not suffered discrimination or retaliation under Sgt. Lombardi. On August 23, 1999, Petitioner's new supervisor became Sgt. Fisten. Petitioner testified that she has suffered no discrimination or retaliation under Sgt. Michael Fisten. The summary judgment record closed in approximately October 1999.

Petitioner Received 220 Hours of Training While At Intracoastal

Since the time Petitioner lodged her discrimination complaint in July 1995, MDPD provided Petitioner with a significant amount of training totaling 220 hours.

REASONS FOR DENYING THE WRIT

The Supreme Court rules require a compelling reason to grant a writ of certiorari. Sup. Ct. R. 10. There are no compelling reasons in this case given the myriad of deficiencies in the record and the Petition's failure to demonstrate any circuit split that would make any difference in the outcome of this case on this record. Accordingly, the writ of certiorari should be denied.

I. THERE IS NO COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT WHERE THE RECORD UNDERMINES THE ALLEGATIONS UPON WHICH REVIEW IS BEING SOUGHT

The writ should be denied because much of the factual basis for the Petition is refuted by the record and because much of the conduct alleged is outside the scope of the EEOC Charge, the operative Complaint, and the statute of limitations. As a result, Petitioner is seeking an advisory opinion about hypothetical facts not fairly presented by the record in this case.

A. CLARIFICATION OF THE RECORD

The writ should be denied because Petitioner's statement of facts did not fairly present the record in this case, thereby asking the Court to accept certiorari based on assertions of fact that are incorrect or incomplete. As a result, Respondent was required to provide the restatement of the facts above. Some of Petitioner's assertions are so incorrect or incomplete, however, that it is necessary to provide this detailed clarification of the record.

The Petition (p. 3) claims that Petitioner's life was made extremely difficult after she complained about sexual harassment in July 1995. The objective facts in the record completely undermine this bald hyperbole made by Petitioner's counsel. First, the Petition states, apparently as an example of retaliation, that Petitioner was transferred to Intracoastal two months after her internal complaint of sexual harassment in 1995. This appears to have referenced the internal complaint to give the impression that the transfer was somehow adverse. It was not. Petitioner asked to be transferred to Intracoastal and MDPD granted the Petitioner's request.

Welcome to the Squad

Instead of having made her life difficult, the record facts show that from July 1995 when she complained through December 1995: (1) Petitioner's request to transfer to the Intracoastal District station was granted, (2) she was permitted to teach swimming at the pool for one week in September 1995, (3) her first supervisor, Sgt. Amabile, wrote "Welcome to the squad" on her first evaluation, (4) she conceded that her first two supervisors (Amabile and Flaherty) and Lieutenant Nelson treated her fine, (5) she received a commendation in October 1995,[6] (6) she received an *above* satisfactory on her annual evaluation in October 1995, and (7) she received a pay raise near the

[6] Another example of a claim in the Petition unsupported by any specific facts in the record is the parentheses claiming that the "decorations" Petitioner received slowed considerably after she filed a harassment complaint. As set forth here, Petitioner received a commendation on her second month at Intracoastal.

end of 1995. In addition, for the next three years, she received either a satisfactory or an above satisfactory evaluation and pay raises every year.

1996 - Sgt. Campbell and Lt. O'Connell

Beginning February 1996, Petitioner reported to Sgt. Marlene Campbell and the Lieutenant in the chain of command became Lt. O'Connell. Petitioner stated that when she first started working for Sgt. Campbell she did not have any problems with her. Petitioner also testified that other than adjusting her score on Petitioner's February 1996 *monthly* evaluation, there was nothing else that Sgt. Campbell did that Petitioner did not agree with.

The Petition (p. 5) claims that Lt. O'Connell improperly lowered scores on an evaluation. The Petition states no basis in fact to support the claim that it was improper and provides no specifics on what was changed in the monthly evaluation. When Petitioner was asked about Lt. O'Connell, she stated that she believed some scores on her February 1996 monthly evaluation were changed to satisfactory and other scores in that evaluation to below satisfactory. Petitioner did not say which categories were below satisfactory and was not specific on how many were changed to below satisfactory. The record shows that on the February 1996 monthly evaluation only one out of the 27 categories was a "4" rating indicating "needs improvement" (which could have been mistakenly referred to as below satisfactory). Petitioner conceded that she did not complain about her monthly evaluation scores being lower

because she was a woman.[7] And Petitioner offered nothing in the record to show that the 4 rating on one category out of 27 was improper.[8] Moreover, regardless of what score Petitioner was given on the February 1996 monthly evaluation, it was immaterial because her overall annual evaluation for the year 1996 was satisfactory. Petitioner received a raise, and she testified that the annual satisfactory rating in 1996 did not damage her in *any way*.

Transfers and Training

The Petition (p. 8) claims that Petitioner made requests to transfer to the Canine Unit and the Property and Evidence Bureau that were denied. (Pet. p. 8). Aside from providing no dates as to when such requests were made, Petitioner's own testimony refutes that she was denied these transfers. Petitioner testified that she was not aware that she has been denied a transfer to these units and in fact she testified that she had been placed on a list of qualified applicants for the Canine Unit and the Property and Evidence Bureau. This was acknowledged by the Eleventh Circuit yet the misstatement appeared in the Petition anyway. (App. to Pet. at p. 5a n.2).

The misstatement appeared again in the Petition (p. 7) where it asserts that Petitioner's five-day suspension

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[7] The Petition (p. 6) claims that Lt. O'Connell told Petitioner not to complain of discrimination again. That was not her testimony and it is undermined by her statement that she did not complain about the scores on the basis of gender bias.

[8] Petitioner admitted that she had no knowledge of why the score on the monthly evaluation was allegedly lowered.

has "negatively affect [sic] her ability to transfer to a specialized unit (which is a desirable assignment, involving higher pay and possible advancement)." Aside from not providing specifics, this assertion is speculation[9] and is refuted by Petitioner's testimony where she admits that she had been placed on the list of qualified applicants for not one, but two, specialized units, the Canine Unit and the Property and Evidence Bureau. In addition, the Petitioner failed to supply any facts in the record that any possible transfer to these two units had any relationship to her 1995 internal complaint of discrimination. Finally, the parentheses about "possible" advancement is misleading and refuted by Petitioner's testimony where she admitted that the suspension did *not* affect her ability to be promoted to Sergeant, the next rank.

The Petition (p. 8) also claims that Petitioner was told that she was denied a transfer to the Doral district because of her complaint of discrimination. This is a distortion of Petitioner's testimony and ignores the inadmissible double hearsay involved which is not competent summary judgment evidence. Petitioner testified that she did not "remember any specifics" to support her claim that the denial was because of her complaint of discrimination.

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[9] Petitioner admitted in testimony that the rate of pay for these specialized units is the same although she "think[s]" that either Canine or some other unit receives hazard pay but she does not even know what it is. Indeed, if Petitioner had been transferred to a unit with hazardous duty pay, she probably would be claiming that it was adverse because the job was more hazardous, thereby making it less desirable not more desirable. Petitioner also has not provided any facts in the record as to whether there were any vacancies in these units, whether anyone else was accepted, and what their relative qualifications were.

Petitioner then stated that she could *not* say that the reason mentioned by Vance for Lt. Cooper's involvement in the Doral transfer request had to do with Petitioner's 1995 Northside sexual harassment complaint. Thus, that allegation in the Petition is also refuted by Petitioner's testimony.

In addition, in the record before the district court, Petitioner offered no facts to establish that a transfer to Doral would be anything more than a "purely lateral transfer" that courts have held cannot be an adverse employment action. (App. to Pet. at 15a n.3).

Lumped in with the incorrect allegations of being denied transfers to the Canine Unit and the Property/Evidence Bureau, the Petition (p. 8) makes an unspecified claim that the Petitioner was denied training. Aside from the lack of specifics, the Petition failed to acknowledge that Petitioner received over 200 hours of training since her 1995 internal complaint of discrimination and in the record below Petitioner provided no specific facts to make a relevant comparison to similarly-situated officers. (App. to Pet. at 21a).

The Petition (p. 5) claimed that Petitioner demanded formal action when another officer battered her. The Petition fails to acknowledge that the officer against whom she demanded formal action, Officer Dubocq, was given a record of counseling after she filed a complaint against him. The Petition also neglects to mention that the so-called battering was an allegation by Petitioner that Dubocq opened his car door and the car door hit her but caused no injury.

Roll Call

The Petition (p. 8) asserts that Lt. Carrell singled out Petitioner by showing up at roll call when Petitioner was there "so he could disparage her." This claim was supported below by the testimony of a fellow officer named Williams who based his assertion of Petitioner being singled out by stating that it "appeared" to him that Lt. Carrel appears at roll call when Petitioner is present and does not appear at roll call when she is not present. There was no specific testimony offered as to the alleged disparagement and Officer Williams admitted, what should be patently obvious to anyone, that there was nothing wrong with Lt. Carrel being at roll call.

Radar Duty

The Petition (p. 6) claims that Petitioner was singled out for radar duty, "an undesirable job assignment." The Petition offered no facts as to when that occurred and offered no facts to support Petitioner's belief that she had been singled out for radar duty. Petitioner was asked when this occurred and what facts she had to support her belief that she was singled out for radar duty and she testified: "as for facts, I don't have any facts. . . . " She supplied no specific objective facts about the relative amount of radar duty of other similarly-situated officers and admitted that she thought others did it *voluntarily* on their own to get statistics. If Petitioner believed others chose to perform radar assignments *voluntarily*, then it certainly cannot objectively be considered an undesirable assignment. Incidentally, the record reflects that Petitioner received 40 hours of radar certification training in March 1997. If she had been assigned radar it would make sense so that the

officer could make use of the training and learn in the field.

Teaching Swimming

The Petition (p. 6) alleges that Lt. Carrell denied Petitioner's request to conduct swim training. The Petition calls this swim "training" which is misleading since it is not Petitioner who is receiving training for her work as a road patrol officer, instead she is training others by teaching swimming, thereby providing service to the MDPD Training Bureau. The Petition fails to identify when between September 1995 and January 1999, these requests were allegedly denied. The Petition also fails to acknowledge that Petitioner was allowed to spend a week at the pool teaching swimming on three occasions after the internal complaint of discrimination in July 1995.

Missing Weapons Report

Petitioner's supervisor commencing in January 1997, was Sgt. Bibi Alonso. Sgt. Alonso supervised Petitioner until April 1997 and Petitioner stated that she had no problems and no discrimination with Sgt. Alonso. The Petition (p. 6) relies on rank speculation to assert that Lt. Carrell engaged in a contrivance related to a missing weapons report during this period. The record shows that what really happened is that during February 1997, Petitioner advised Sgt. Alonso in a memorandum that she lost a gun that had been issued to her. Lt. Carrell suggested that the report be changed to stolen, which would arguably make Petitioner seem less culpable. In any event, the Petitioner's brief before the Eleventh Circuit conceded that Petitioner "was never disciplined for

anything having to do with the missing revolver." Imagine that, Petitioner loses her service revolver and she receives no discipline. That she would not be disciplined for such an obvious breach of conduct completely undermines Petitioner's claim of retaliation.

The Petition (p. 6) in the next sentence after the missing revolver issue then alleges that "during this time" she received improperly lowered evaluation scores. Despite the glaring lack of specifics, this allegation is undermined by Petitioner's testimony because she stated that when she was supervised by Sgt. Alonso (under whom the missing revolver incident occurred), she had no problems and no discrimination with Sgt. Alonso. So what evaluation is the Petition referring to here? The allegation is also undermined by the stipulated fact that every year Petitioner received either a satisfactory or above satisfactory annual evaluation and a pay raise.

Buchman (early 1998)[10]

The Petition (p. 8) claims that Buchman interfered with a call Petitioner was handling and issued her written discipline. Petitioner was asked about this issue and she admitted that she did *not* receive discipline about this incident.

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[10] As set forth in the Restatement of Facts, Petitioner only worked with Sgt. Buchman for about four months in early 1998, almost two and one-half years after the internal complaint of discrimination in July 1995 that was the only protected activity cited in Petitioner's EEOC charge.

The Petition (p. 8) claims that Buchman made a sexist remark. Besides the fact that Petitioner only appealed the retaliation claim and not the gender bias claim, Petitioner testified repeatedly and unequivocally that Buchman never said anything sexist to her.

The Petition (p. 8) claims that Buchman lowered certain scores on her evaluation to below satisfactory. When this claim was made below, the support cited for it referred to Petitioner's testimony about Buchman's January 1998 monthly evaluation of Petitioner that was presented in February 1998. Petitioner could only state that she "*believed*" that "*a* particular category" on the monthly evaluation had been lowered to below satisfactory. One particular category out of 27 categories in a monthly evaluation in January 1998 that Petitioner "believes" was lowered to below satisfactory is not an adverse employment action, especially where at the end of 1998, in her annual performance evaluation that includes all of the months of the year, Petitioner received an above satisfactory annual performance evaluation and a merit increase in pay. Additionally, Petitioner stated that Buchman told her that the score (in *a* particular category) on the monthly evaluation was lowered because she "didn't have the same statistics as the rest of the squad and that's why I deserved it," which is certainly a legitimate non-retaliatory reason that Petitioner has failed to dispute with record facts.

Fitness for Duty (May 1998)

The Petition (p. 8) claims that petitioner was forced to undergo a fitness for duty examination "for no reason other than to disparage her." There is no basis in fact for

this assertion and it is refuted by Petitioner's testimony in which she first claimed that Buchman "never gave her a reason" and then stated that "I don't think I got a straight answer other than it had to do with my sick time." In any event, Petitioner passed the examination and she admitted that she did not lose any pay because of the fitness for duty examination. Petitioner also admitted that Buchman did not tell her that the fitness for duty examination was because she had made a complaint of discrimination, which incidentally had occurred almost three years earlier. As noted by the district court, the record also reflected that Petitioner was not the only officer required to undergo a fitness for duty examination. (App. to Pet. at 20a n.13).

May 1998

In May, 1998, the Petition (p. 9) states that Petitioner was switched to Sgt. Sharon Soderman's squad for two shifts (approximately 8 months), but failed to acknowledge that Petitioner testified that she had no problems and no discrimination from Sgt. Soderman. During this period in 1998, the Captain at Intracoastal was Capt. Heller. Petitioner testified that she did not feel she was treated more harshly under Capt. Heller.

The Petition (at 9) complains about Lt. Diers checking into Petitioner's mileage reimbursement, but fails to acknowledge that Petitioner admitted that her original mileage reimbursement request was honored by the Department and that she did not lose any money as a

result of the mileage reimbursement incident with Lt. Diers.

Conclusory Opinions

With few facts to support her assertions, Petitioner attempts to make much out of the conclusory opinion of Lt. McGillivray to support the retaliation claim at issue in the appeal. Such subjective opinions, which are devoid of any specific facts within the personal knowledge of the witness, are not competent evidence to defeat the summary judgment motion which rests almost entirely on stipulated facts and Petitioner's testimony. *See Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220, 1226 (11th Cir. 1999) ("conclusory allegations without specific supporting facts have no probative value."); *Doe v. DeKalb County School District*, 145 F.3d 1441, 1449 (11th Cir. 1998) (finding subjective opinions insufficient). Such opinions may also be inadmissible not because Rule 701 of the Evidence Rules prohibits it but because the perceptions are not adequately supported and are not helpful to the understanding of the issue. *Cf. Mitroff v. Xomox Corp.*, 797 F.2d 271 (6th Cir. 1986).

For example, the Petition alleges that it was Lt. McGillivray's opinion that he had never heard an officer being suspended for allegedly making a bad arrest. His opinion is immaterial. That he may never have heard of it speaks only of his knowledge or lack thereof. McGillivray admits he was not a witness to any of the events that led up to Petitioner's suspension. The Petition also offered McGillivray's opinion that it was not customary to relate a bad arrest to internal affairs. The Petition failed to acknowledge that McGillivray testified that a bad arrest

"could" be referred to internal affairs, "[I]t would depend on the circumstances." Accordingly, these opinions are immaterial.

B. ALLEGATIONS NOT IN SECOND AMENDED COMPLAINT

Much of the Petition relies on assertions that purport to be adverse employment actions that were never alleged in the Second Amended Complaint and should not form the basis for Petitioner's claim. *See Manniccia v. Brown*, 171 F.3d 1364 (11th Cir. 1999) (courts need not supply allegations to assist a claim). If an action was so important to Petitioner to consider it an adverse employment action, then it should have been alleged in the Second Amended Complaint. Moreover, these alleged actions were not contained in Petitioner's EEOC Charge which frames the scope of a judicial action under Title VII.

The alleged adverse employment actions that Petitioner relies upon in this Petition that were not alleged in the Second Amended Complaint or the EEOC Charge and should not be considered are: (1) Sgt. Buchman allegedly interfered with a call that Petitioner was handling regarding a robbery suspect (Pet. p. 8); (2) Petitioner received "formal discipline" regarding the disagreement with Buchman (during 1998) about the robbery suspect incident (which is not true) (Pet. p. 8); (3) Petitioner had to perform a fitness for duty examination (Pet. p. 8); (4) Petitioner claimed she was not transferred to Doral District and other transfer requests were allegedly denied (Pet. p. 8); (5) Lt. Carrell showing up at roll call (Pet. p. 8); (6) radar duty (Pet. p. 6); and (7) Lt. Diers checked up on Petitioner's mileage reimbursement (Pet. pp. 9-10). Most

telling of all, the 1997 suspension was not specifically alleged in the Second Amended Complaint or the EEOC Charge. As these alleged actions were so unimportant that they were not even alleged in the Second Amended Complaint or the EEOC Charge, they should not be considered as a basis for Petitioner's claim. Accordingly, much of what Petitioner relies upon to request certiorari is not properly before the Court undermining the purpose of certiorari review.

C. ALLEGATIONS THAT ARE TIME-BARRED

As if the aforementioned problems with the factual basis for Petitioner's claims were not enough, the allegations in the Petition prior to September 1996 are time-barred because even if they occurred, they occurred more than 300 days before Petitioner's June 30, 1997, EEOC Charge. This would bar the allegations set forth in the Petition (pp. 4-6) regarding Capt. Linville in late 1995, Lt. O'Connell in February 1996, Major Gentile in May 1996, and Lt. Carrell before September 1996. These could not fairly be considered as adverse employment actions, because if, as Petitioner argues, the actions were significant enough to constitute adverse employment actions, then they were sufficiently important to be the subject of a timely-filed EEOC Charge. Since they were not the subject of a timely-filed EEOC Charge, they cannot be properly before the Court rendering such allegations inappropriate to consider as a basis for seeking certiorari review.

II. CERTIORARI IS NOT WARRANTED BECAUSE THERE IS NO CONFLICT RELEVANT TO THIS CASE ON THIS RECORD

A. THERE IS NO CONFLICT WITH THIS COURT

Petitioner in three places in the Petition claims that the Eleventh Circuit's unpublished per curiam opinion in this case conflicts with a decision of this Court. (Pet. pp. iii, 10, 13) (heading II). The only Supreme Court case the Petition cites to support this purported conflict is *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). In *Robinson,* the Court decided the narrow question of whether a former employee is considered within Title VII's definition of employee for purposes of asserting a retaliation claim under Title VII. The Court rendered no opinion on what was the requisite conduct necessary to constitute an adverse employment action required to support a claim of retaliation and did not indicate that a far less standard than ultimate employment actions are needed to satisfy the adverse employment action element for a retaliation claim. Indeed, these terms were not even mentioned in the Court's opinion. Thus, Petitioner's claim that the Eleventh Circuit's decision here conflicts with the Supreme Court's decision in *Robinson* is meritless.

B. THERE IS NO CONFLICT WITH OTHER ELEVENTH CIRCUIT OPINIONS

Conflicts within a circuit are hardly a compelling basis for demanding that the Supreme Court intercede and grant certiorari. Even if the argument were considered, the conflict within the Eleventh Circuit that

Petitioner asserts is illusory and was refuted by the Eleventh Circuit in its opinion in this case.

First, the Eleventh Circuit denied the Petitioner's request to have this case heard *en banc*, which is the vehicle for resolving conflicting panel decisions within a federal circuit.

Second, a review of the two decisions that Petitioner claims are in conflict, *Wideman v. Wal-Mart Stores*, 141 F.3d 1453 (11th Cir. 1998) and *Gupta v. Board of Regents*, 212 F.3d 571 (11th Cir. 2000), reveals the exact opposite of a conflict. Far from conflict, in *Gupta*, the Eleventh Circuit relied on and quoted the standard for adverse employment action from *Wideman* as follows:

> An adverse employment action is an ultimate employment decision, such as discharge or failure to hire, or other conduct that 'alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee.' *Robinson v. City of Pittsburgh,* 120 F.2d 1286, 1300 (3d Cir. 1997) (citation and internal marks omitted). Conduct that falls short of an ultimate employment decision must meet 'some threshold level of substantiality . . . to be cognizable under the anti-retaliation clause.'

(Quoting from *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998).

Third, despite the fact that *Gupta* quotes *Wideman*, Petitioner argued to the Eleventh Circuit that *Gupta* was

in conflict with *Wideman*.[11] The Eleventh Circuit addressed the claim and explained to the Petitioner that the decisions were not in conflict. (App. to Pet. at 4a & n.1).[12] Accordingly, there is no conflict within the Eleventh Circuit requiring this Court to grant certiorari.

C. THERE IS NO CONFLICT THAT WOULD CHANGE THE RESULT OF THIS CASE

There is no conflict between the Eleventh Circuit's opinion in this case and the other circuits cited in the Petition on the facts in this record.

The Eleventh Circuit in this case relied on *Wideman* and *Gupta*. *Wideman* stated expressly that the Eleventh Circuit joins the majority of circuits that hold that Title VII's protection against retaliatory discrimination extends to adverse employment actions that fall short of ultimate employment decisions. Indeed, this language is quoted in the Petition and is the standard that Petitioner advocates the district court and Eleventh Circuit panel should have used. Of course, as the Eleventh Circuit panel opinion made clear, it did rely on the standard in *Wideman* that an ultimate employment action is not required. Thus, the Eleventh Circuit's opinion in this case is in line with the majority of the circuits that have considered the issue, assuming there is a true split. Arguably, there may not be

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[11] In discussing the actions taken against the employee in *Wideman*, the Petition conveniently leaves out the fact that the employee in *Wideman* was given a one-day suspension.

[12] It is startling that after it was pointed out by the Eleventh Circuit in this case that these two decisions are not in conflict, Petitioner continues to claim that they are in conflict.

a true conflict on the specific facts of each case because the cases have been rapidly evolving depending on the specific factual circumstances faced by the courts and it appears that much of the asserted conflict might be semantic.

Petitioner relies primarily on the Fifth Circuit's decision in *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997) to assert that there is a conflict with the Eleventh Circuit's decision in *Wideman*. Petitioner appears to be using this Petition to seek review of the Fifth Circuit's decision in *Mattern*. This is not an appropriate use of certiorari since it would make no difference in this case.

Petitioner's conflict argument is flawed because a hypothetical circuit split between two other cases neither of which is still at issue do not warrant the Court granting certiorari in this case. First, the Court already denied certiorari in *Mattern*[13] in 1997 and *Gupta*[14] in 2001. Second, there is no conflict between *Mattern* and the Eleventh Circuit's panel decision *in this case* because under either circuit's view (assuming there is much of a practical difference), the Petitioner here would have no valid retaliation claim given that the Petitioner claims that the Fifth Circuit has a more stringent standard. Thus, resolving the purported conflict between the Eleventh Circuit's panel decision here and *Mattern* will not change the

[13] 522 U.S. 932 (1997).

[14] 531 U.S. 1076 (2001).

result of this case. Accordingly, it makes no sense to grant certiorari and use this case to resolve the purported conflict.

CONCLUSION

The Supreme Court rules require a compelling reason to grant a writ of certiorari. Sup. Ct. R. 10. There is no compelling reason in this case given the myriad of deficiencies in the record and the lack of any circuit split that would make any difference in the outcome of this case on this record. Accordingly, the Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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